Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

(3)

No. 97-906

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

LEANNA C. BLANKENSHIP,
Petitioner,

v.

PARKE CARE CENTERS, INC., doing business as Barbara Parke Convalescent Center, *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF HER PETITION FOR WRIT OF CERTIORARI

Katharine C. Weber, Esq.
Counsel of Record
Curtis L. Cornett, Esq.
Cors & Bassett
1200 Carew Tower
Cincinnati, Ohio 45202
(513) 852-8200

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT.....	2
A) Despite Respondents' Assertion To The Contrary, The Sixth Circuit's Holding That The Employer's Conduct Must Be More Culpable Than "Mere Negligence" Before The Employer May Be Held Liable Under Title VII For Failing To Take Prompt And Appropriate Corrective Action Is In Conflict With Virtually All Of The Other Circuit Courts Which Have Addressed This Issue.	2
B) Granting Certiorari In This Case Would Provide This Court With The Perfect Vehicle To Fully And Finally Resolve The Issue Of Employer Liability In Both Supervisor And Co-Worker Hostile Environment Cases Now That Certiorari Has Been Granted In *Faragher*.....	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:	Page:
Alton v The Board of Education of Boyne City Public Schools, 1997 U.S. Dist. LEXIS 20046 (W.D. Mich. Nov. 24, 1997)	3,4
Bouton v. BMW of North America, 29 F.3d 103 (3rd Cir. 1994)	4,5
Carr v. General Motors, 32 F.3d 1007 (7th Cir. 1994)	4
Cole v. Knoll, Inc., 1997 U.S. Dist. LEXIS 19927 (W.D. Mich. Oct. 7, 1997)	3,4
Faragher v. City of Boca Raton, No. 97-282	1,6
Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995)	5
Jansen v. Packaging Corp. of America, 123 F.3d 490 (7th Cir. 1997)	4
Katz. v. Dole, 709 F.2d 251 (4th Cir. 1983)	5
Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986)	3

Other Authority: **Page:**

EEOC COMPLIANCE MANUAL,
(BNA) § 615.4(a)(9)(iii) 5

INTRODUCTION

In their opposing brief, respondents argue that the Sixth Circuit's opinion below does not create any split among the circuit courts because, in finding that respondents were not liable for the sexual harassment suffered by petitioner, the majority utilized the well-established rule that "the employer is not liable unless it failed to implement prompt and appropriate corrective action once it learned of the harassment." (Respondents' Brief at 6.) Because this issue is central to this petition, and because respondents have grossly distorted the Sixth Circuit's opinion in this regard, petitioner will briefly address respondents' argument in this reply memorandum.

In addition, respondents assert that this Court's recent decision to grant certiorari in *Faragher v. City of Boca Raton*, No. 97-282, "has no relevance to the present case" because *Faragher* deals with employer liability in the context of alleged hostile environment sexual harassment committed by a supervisor, not a co-worker as is alleged in the instant case. (*Id.* at 12.) However, as discussed below, petitioner submits that the present case is the perfect companion to *Faragher* as it provides this Court with the opportunity to definitively resolve the issue of employer liability in both supervisor and co-worker hostile environment cases.

ARGUMENT

A) Despite Respondents' Assertion To The Contrary, The Sixth Circuit's Holding That The Employer's Conduct Must Be More Culpable Than "Mere Negligence" Before The Employer May Be Held Liable Under Title VII For Failing To Take Prompt And Appropriate Corrective Action Is In Conflict With Virtually All Of The Other Circuit Courts Which Have Addressed This Issue.

Respondents would have this Court believe that the Sixth Circuit's opinion below was in the mainstream of Title VII jurisprudence when it held that the nursing home was not liable for Walter Malcolm's harassment of petitioner because the circuit court found that the nursing home took prompt and appropriate corrective action when it learned of Malcolm's harassment. (Respondents' Brief at 6; Pet. App. A8.) What respondents fail to discuss, however, is the manner in which the circuit court construed and applied this "prompt and appropriate" rule, which is contrary to the reasoning of virtually every other circuit court which has addressed this issue. As discussed below, the Sixth Circuit effectively created a new standard by which the appropriateness of an employer's response to claims of co-worker sexual harassment is measured.

The majority opinion expressly found that "mere negligence" was not sufficient to impose liability on an employer when that employer is fashioning a remedy in response to a complaint of co-worker hostile environment sexual harassment. As Circuit Judge Engle wrote for the majority:

> Once an employer is aware of and responds to charges of sexual harassment ... mere negligence

> as to the content of the response cannot be enough to make the employer liable.
>
> ★★★
>
> In sum, although negligence as to the existence of harassment may be enough under *Rabidue [v. Osceola]* for an employer to incur liability for discrimination, negligence in the fashioning of the remedy is not.

(Pet. App. A10.)

Similarly, Judge Merritt wrote in his concurring opinion:

> The standard seems to me somewhere in between "negligence" and "intentional" wrongdoing. Perhaps we could call it deliberate indifference.... (*Id.* at A14.)

Accordingly, the majority plainly held that negligence on the part of the employer in responding to a complaint of co-worker sexual harassment is simply not enough to impose liability on that employer and any contrary interpretation is simply unsupportable by the opinions authored below.

Indeed, although respondents assert that "district courts within the Sixth Circuit do not appear to share the petition's [*sic*] interpretation of the opinions below" (Respondents' Brief at 8),[1] the fact is that the district court in *Alton v. The Board of*

---

[1] The case cited by respondents as support for this statement, *Cole v. Knoll, Inc.*, 1997 U.S. Dist. LEXIS 19927 (W.D. Mich. Oct. 7, 1997), does not even discuss the standard of liability to be applied when analyzing an employer's response to a complaint of co-worker sexual harassment because the plaintiff's Title VII claim was dismissed for failure to file an EEOC charge. *Id.* at ★★ 23-24. Instead, the *Cole* court cited the majority opinion below for the unremarkable proposition that an employer is legally obligated to investigate

Education of Boyne City Public Schools, 1997 U.S. Dist. LEXIS 20046 (W.D. Mich. Nov. 24, 1997) cited and wholly adopted the majority's opinion below and applied it to claims of sexual harassment asserted under Title IX. *Id.* at ★★ 22-24. The *Alton* court stated:

> If the school board responds with good faith remedial action it cannot be said to have itself committed an act of discrimination. It will be liable under Title IX for student-on-student sexual harassment only if its response exhibits such indifference as to indicate an attitude of permissiveness that amounts to discrimination.

Id. at ★★ 23-24. In short, petitioner's interpretation of the majority opinion below is in fact shared by at least one district court in this circuit.

Furthermore, despite respondents' assertions to the contrary, the Sixth Circuit's holding below that something more than negligence must be proven before an employer may be held liable for co-worker sexual harassment is in direct conflict with all of the following circuit court decisions: *Carr v. General Motors*, 32 F.3d 1007, 1012 (7th Cir. 1994) (holding that employer's response to complaint of co-worker sexual harassment was inadequate and stating that "[w]e said that the standard was negligence, and we think it plain that negligence was proved")[2]; *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 107 (3rd Cir. 1994) ("Courts of appeal that have spoken

---

charges of harassment. *Id.* at ★ 52.

[2] In fact, it is because the negligence standard for co-worker harassment is so well-engrained in the Seventh Circuit that Chief Judge Posner referred to these type of cases as "the easy ones." *Jansen v. Packaging Corp. of America*, 123 F.3d 490, 511 (7th Cir. 1997).

readily accept the negligence concept ... if the harassment is reported to the employer); *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995) ("In this circuit ... as in other circuits, remedies should be **reasonably** calculated to end the harassment"); *Accord, Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

Indeed, in *Fuller*, not only did the Ninth Circuit adopt a reasonableness standard for determining whether an employer's response was prompt and appropriate, the court also held that the employer's response must be "effective". 47 F.3d at 1528. The *Fuller* court elaborated on this standard by stating:

> Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment....

Id. Moreover, the Equal Employment Opportunity Commission Guidelines state that, in determining whether an employer's response to a charge of co-worker sexual harassment is appropriate, the Commission should ascertain whether the response "fully remedie[s] the conduct without adversely affecting the terms or conditions of the charging party's employment in some manner...." EEOC COMPLIANCE MANUAL (BNA) § 615.4(a)(9)(iii), ¶ 615:0013, at 59.

In the present case, the nursing home's response to petitioner's complaints of sexual harassment did not end her harassment nor did it deter her harasser. Moreover, petitioner remains baffled as to how it could ever be an appropriate response for an employer to require the victim of sexual harassment to choose between having to continue to work around her harasser or resigning her employment, which were

the only two options presented to petitioner by respondents in the instant case.[3]

In short, the Sixth Circuit's opinion in this case that an employer's response to a complaint of co-worker sexual harassment may be negligent yet nonetheless "prompt and appropriate", is squarely at odds with the majority of the existing Title VII precedent. More importantly, this skewed reasoning affected the outcome of this case. This Court should grant certiorari for these reasons alone.

B) Granting Certiorari In This Case Would Provide This Court With The Perfect Vehicle To Fully And Finally Resolve The Issue Of Employer Liability In Both Supervisor And Co-Worker Hostile Environment Cases Now That Certiorari Has Been Granted In *Faragher*.

As respondents correctly point out in their opposing brief, *Faragher v. City of Boca Raton*, No. 97-282, involves alleged sexual harassment by supervisors and an employer's liability for such alleged harassment. However, petitioner strongly disagrees with respondents' assessment that *Faragher* "has no relevance to the present case" simply because supervisor harassment is alleged in *Faragher*. Indeed, it is precisely because the issue presented in the present case, i.e., the scope of employer liability for co-worker sexual harassment, is missing from *Faragher*, that petitioner submits that this Court

---

[3] Although respondents claim that petitioner's resignation "must be presumed voluntary" (Respondents' Brief at 10), the Complaint and Amended Complaint filed by petitioner in this action both clearly allege that respondents "effectively terminated [her] employment when [they] coerced her to write and sign a resignation letter and escorted her out of the facility." Petitioner consistently maintained this position throughout the litigation below.

should also grant certiorari in this case so that the scope of employer liability in all hostile environment cases, including both supervisor and co-worker sexual harassment, may be definitively decided once and for all.

CONCLUSION

For all of the foregoing reasons, and for the reasons previously set forth in her petition, petitioner respectfully submits that her petition should be granted.

Respectfully submitted,

Katharine C. Weber by Curtis L. Co

Katharine C. Weber, Esq.
Counsel of Record
Curtis L. Cornett, Esq.
Cors & Bassett
1200 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202
(513) 852-8200

Counsel for Petitioner

Date: January 9, 1998

BEST AVAILABLE COPY